United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

75-7534

United States Court of Appeals
FOR THE SECOND CIRCUIT

LORRAINE BERMAN,

Plaintiff-Appellant,

against

CARL A. VERGARI, District Attorney of Westchester County,

Defendant-Appellee.

B P/S

PETITION FOR REHEARING AND FOR REHEARING EN BANC

SHATZKIN, COOPER, LABATON
RUDOFF & BANDLER
Attorneys for Plaintiff-Appellant
235 East 42nd Street
New York, New York 10017

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Preliminary Statement

Plaintiff-appellant petitions for rehearing and rehearing en banc of this Court's affirmance of the opinion of the Court below[1] dismissing plaintiff-appellant's complaint

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[1] MEMORANDUM DECISION BY WARD, D. J., AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS.

August 18, 1975

Defendant moves to dismiss this action in which plaintiff seeks to enjoin her prosecution under an indictment handed down by a grand jury selected in a manner which systematically exempted women from service.

As the Supreme Court has stated: "In *Taylor* v. *Louisiana*, —— U.S. —— (1975), we held that the Sixth and Fourteenth Amendments command that petit juries must be selected from a source fairly representative of the community." *Daniel* v. *Louisiana*, 43 U.S.L.W. 3415 (January 27, 1975). Since *Daniel* held *Taylor* not retroactive to *convictions* by juries empanelled prior to the date of that decision and since the grand jury which indicted her was em-

(footnote continued on following page)

seeking to permanently enjoin the appellee from prosecuting her in a pending state criminal court proceeding. The grand jury which indicted appellant was impaneled pursuant to Section 665(7) of the New York State Judiciary Law which section, in violation of the Constitution of the United States (*Taylor* v. *Louisiana,* 419 U.S. 522 (1975)) allowed women an automatic exemption from jury service. There were no women on the grand jury which indicted appellant. The indictment was returned on August 14, 1974. To date, there has been no trial of the appellant.

Rehearing and rehearing, en banc is justified, because, notwithstanding that both the Court below and this Court were urged to enforce the Supremacy Clause, they erroneously dismissed the complaint in reliance upon *Younger* v. *Harris,* 401 U.S. 37 (1971) and *Mitchum* v. *Foster,* 407 U.S. 225 (1972), neither of which dealt with the Supremacy Clause.

(footnote continued on following page)

panelled prior to the Court's decision in *Taylor,* plaintiff argues that she may only attack this indictment prior to any conviction.

Plaintiff's proper course, however, is by way of appeal from any judgment of conviction, first to the state courts, and if necessary, to the Supreme Court of the United States. She has failed to establish the irreparable injury or bad faith which alone would justify enjoining a state criminal proceeding. *Younger* v. *Harris,* 401 U.S. 37 (1971); *Mitchum* v. *Foster,* 407 U.S. 225 (1972). Accordingly, defendant's motion is granted and the complaint dismissed.

It is so ordered.

ROBERT J. WARD
U.S.D.J.

ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION.

August 18, 1975

Motion denied in accordance with memorandum endorsed on defendant's motion to dismiss.

It is so ordered.

ROBERT J. WARD, U.S.D.J.

Facts

1. Appellant was indicted by an all male grand jury[2] impaneled pursuant to Section 665(7) New York State Judiciary Law, pursuant to which women were permitted to exclude themselves from jury service.

2. *Taylor* v. *Louisiana, supra,* declared that such a statute was unconstitutional. *Daniel* v. *Louisiana,* 420 U.S. 31 (1975), decided one week after *Taylor,* held that *Taylor* would not be applied retroactively to those cases in which there had been a conviction.

3. The statute, pursuant to which the Grand Jury which indicted appellant was impaneled, has been repealed and the Governor's message accompanying the repeal acknowledged its unconstitutionality.

4. Appellee has conceded the unconstitutionality of the statute by which appellant was indicted.

5. Appellant's motion to dismiss the indictment in the State court, on the strength of *Taylor,* was denied. If the Federal Court does not intervene to enforce the Supremacy Clause, appellant will be required to stand trial, because Section 450.10 of the New York Criminal Procedure Law prohibits a pre-conviction appeal from an order denying a Motion to dismiss an indictment. If convicted, that conviction must be reversed.

It appeared on oral argument of this appeal that the Court focused on the narrow issue of the effect of *Daniel* on *Taylor, supra.* Obviously, if *Daniel* limited *Taylor* so that it applied not only to cases in which there had been convictions, but also to those in which there had not, then appellant could not argue the application of the Supremacy Clause.

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[2] Appendix, pp. 11A-12A.

However, *Daniel* held:

> that Taylor is not to be applied retroactively, as a matter of federal law, *to convictions* obtained by juries empaneled prior to the date of that decision.

(emphasis added). 420 U.S. at 32.

Recently, the New York Court of Appeals, commenting on the meaning of *Daniel,* stated:

> 'Retroactivity' took a prospective turn, reaching only to cases as yet *untried.*

(emphasis added). *People* v. *Morales,* 37 N.Y.2d 262, 268 (1975).

Questions Presented

1. May a State Court ignore the Supremacy Clause in its interpretation of a statute which has been held by the United States Supreme Court to be constitutionally tainted?

2. Does comity require the Federal Courts to abstain from enjoining the pending state prosecution in such circumstances?

POINT I

The principle of federal abstention in state court criminal proceedings is not superior to the Supremacy Clause.

Justice Black, in his decision in *Younger* v. *Harris,* 401 U.S. 37 (1971) referred to "Our Federalism" as a concept which represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities

of the States." 401 U.S. at 44. But significantly, he also said:

> [A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. 401 U.S. at 52.[3]

Since *Taylor* controls the case at bar, the Supremacy Clause must be enforced.

In neither *Younger* nor *Mitchum,*[4] in which the Court established criteria for Federal intervention, was the

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[3] The unconstitutionality of Section 665(7) is beyond challenge. The Governor's message accompanying the repeal of Section 665(7) stated:

> The repeal of the women's exemption will permit the Courts to begin the immediate impanelling of juries in conformity with the Taylor case, without having to wait for a decision by the New York State Court of Appeals officially declaring the women's exemption unconstitutional.

McKinney's Session Law News, March 25, 1975 No. 1, p. A-71. The appellee was forced to concede, as he did, the statute's unconstitutionality.

The District Attorney is an arm of the Executive Branch and a declaration by the Governor of a statute's recognized unconstitutionality should be sufficient. Prosecution in the face of such declaration is not a faithful execution of the laws.

[4] In *Mitchum,* the Supreme Court refined the doctrine of *Younger* v. *Harris, supra,* and established the criteria for federal intervention in the granting of equitable relief. A state prosecution will be enjoined:

> [1] where irreparable injury is "both great and immediate" . . . [2] where the state law is " 'flagrantly and patently violative of express constitutional prohibitions,' " . . . or [3] where there is a showing of "bad faith, harassment or . . . other unusual circumstances that would call for equitable relief." (407 U.S. at 230).

These criteria are disjunctive. The second criterion requires no factual finding and is constitutionally obligatory. The issuance of an injunction when state law is "flagrantly and patently violative of express constitional prohibitions," is a reaffirmation of the Supremacy Clause.

Court faced with a state prosecution continued or undertaken in the face of one of its own decisions in which it had ruled that the challenged statute was unconstitutional. A constitutional rule enunciated by the United States Supreme Court requires the application of the Supremacy Clause. *Sims* v. *Georgia,* 385 U.S. 538, 544 (1967). As Mr. Justice Black stated in *Younger,* that rule must be obeyed.

While the Federal Courts may be reluctant to interfere with state criminal proceedings because of comity, ". . . the sharp edge of the Supremacy Clause cuts across all such generalizations." *United States* v. *McLeod,* 385 F. 2d 734, 745 (5th Cir. 1967).

The principle of comity is not superior to the Supremacy Clause. The continued prosecution is unconstitutional and intervention is warranted.

POINT II

When the Supremacy Clause is violated, prosecution in defiance thereof is bad faith and results in irreparable harm.

Defiance of the Supremacy Clause or the presence of "patent unconstitutionality" leads inexorably to the conclusion that the prosecution is in bad faith. There can be no hope that appellee can secure a valid conviction and his inability to do so satisfies the test of bad faith prosecution. (*Kugler* v. *Helfant,* 421 U.S. 117, 126 n. 6). Prosecution in bad faith results in irreparable harm.

Hence, this Court should intervene to enjoin the pending state criminal prosecution.

CONCLUSION

Rehearing and rehearing en banc should be granted.

Dated: March 22, 1976

Respectfully submitted,

SHATZKIN, COOPER, LABATON,
RUDOFF & BANDLER
Attorneys for Plaintiff-Appellant

BURTON S. COOPER,
of Counsel

Certification of Good Faith.

I, BURTON S. COOPER, one of the attorneys for Petitioner, hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and that it is not filed for the purpose of delay.

BURTON S. COOPER

Douglas Cooper

376—Affidavit of Service by Mail

United States Court of Appeals
for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Lorraine Berman
Plaintiff-Appellant

against

Carl A. Vergari, District Attorney of
Westchester County,

Defendant-Appellee

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is
agent for Shatzkin Cooper & Labataon the attorney
for the above named Plaintiff-Appllean herein. That he is over
21 years of age, is not a party to the action and resides at Levittown, New York

That on the 26th day of March , 19 76 he served the within
Petitionx for rehearing

upon the attorneys for the parties and at the addresses as specified below

Carl A. Vergari Esq.
District Attorney Westchester County
County Courthouse, 111 Grove Street
White Plains, New York

by depositing 3 true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 26th.
day of March, 19 76

Roland W. Johnson

Raymond J. Braddick

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977